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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VERNON WHITAKER et al., Defendants and Appellants.	B205497 (Los Angeles County Super. Ct. No. GA064535)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline H. Nguyen, Judge. Affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant Vernon Whitaker,

David D. Martin, under appointment by the Court of Appeal, for Defendant and Appellant Raleigh Henderson.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Vernon Whitaker and Raleigh Henderson appeal from the judgments entered following a jury trial that resulted in their convictions for first degree burglary. Whitaker was sentenced to a prison term of 35 years to life. Henderson was sentenced to a term of 9 years.

Appellants contend the trial court erred by: (1) denying their motions for in camera review of police personnel records (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531); (2) denying their motions for a mistrial, brought on grounds of juror misconduct; and (3) instructing with CALCRIM Nos. 223, 226, and 302. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Viewed in accordance with the usual rules governing appellate review (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues presented on appeal established the following.

On January 31, 2006, at approximately 9:00 a.m., officers from the Los Angeles Commercial Crimes Division were conducting an investigation into a string of burglaries. The team leader, Detective David Evans, was supervising a surveillance team consisting of six Los Angeles Police Department (L.A.P.D.) officers, i.e., Anthony Acosta, David Morales, David Alvarez, Jesse Morales, Howard Jackson, and Rudolfo Chong. The officers were working in plainclothes and driving undercover vehicles.

The team began surveillance in the 200 block of West 74th Street. Based on information developed earlier, Evans's attention was drawn to a champagne-colored Cadillac Escalade being driven by appellant Raleigh Henderson. Officers followed the Escalade. After new rims were placed on the vehicle at a tire shop, Henderson drove off with codefendant Dyno West in the front passenger seat, and twin brothers Larron Taylor and appellant Vernon Whitaker in the back seat.

Officers followed the Escalade for approximately two hours, during which time the occupants of the Escalade appeared to be "casing" homes to burglarize. Henderson traveled to Walnut and drove through a residential neighborhood. He then drove to

Rosemead, and again drove through a residential area. The Escalade stopped in the middle of the street, or curbside, on at least three occasions, for periods of three to ten minutes. Next, Henderson drove to San Gabriel and stopped the Escalade in front of a house located on North Charlotte Street, with a "for sale" sign in front. One of Henderson's passengers approached the front door, knocked, and re-entered the Escalade. The group then drove away.

At approximately noon, Henderson parked in front of Han Ngo's two-story home located in Rosemead. Officer Alvarez parked his vehicle in a driveway nearby and continued surveillance of the Escalade and its occupants. Ngo was in an upstairs bedroom of the house, watching television with his young niece. Henderson exited the car, knocked on a metal security door screen, opened it, and then reentered the Escalade. Whitaker and Taylor then exited the Escalade, knocked on Ngo's front door, opened the door, and entered the home. Henderson drove to a nearby area and waited with West.

Inside the house, Ngo saw an African-American man open the bedroom door. Both Whitaker and Taylor fled upon seeing Ngo. Ngo grabbed a knife and chased the intruders, and observed them enter the back seat of the Escalade. Officer Alvarez observed both Whitaker and Taylor running from the house with Ngo in pursuit. The Escalade then sped away. Alvarez stopped to aid Ngo. Other officers continued their surveillance of the Escalade.

Henderson drove from the area, stopping briefly near an onramp to the 10 Freeway. Whitaker jumped from the back passenger seat, and was soon apprehended by Sergeant Chong, who had been following the vehicle.

Officers then lost sight of the Escalade. They subsequently located it parked in a nearby Kentucky Fried Chicken parking lot. Taylor was arrested at a nearby bus stop, eating Kentucky Fried Chicken food.

The Alhambra Bowling Center is located next to the Kentucky Fried Chicken restaurant where the Escalade was discovered. Officer Chong entered the bowling alley and observed Henderson at the cashier's counter. Henderson had paid for two people to bowl, and had asked the clerk for the telephone number of a taxi company. Henderson

and West were observed bowling together. They separately visited the men's restroom. After backup officers arrived, Henderson and West were arrested. Inside the men's bathroom trash can, officers discovered a hand-held radio scanner set to police channels in East Los Angeles and San Gabriel; a black jacket and baseball cap similar to those West had been wearing earlier during the day; and a blue shirt that Henderson had been wearing earlier in the day.

Whitaker's, Henderson's, and Taylor's finger or palm prints were found in the Escalade. The vehicle had once been registered to Henderson's Anaheim apartment address.

The People presented evidence of three uncharged burglaries in which appellants or co-defendants were involved, as well as a March 8, 2005 burglary in which Taylor and West were charged with receiving stolen property.

2. *Procedure.*

Whitaker, Henderson, West, and Taylor were tried together.[1] Both Whitaker and Henderson were convicted of first degree burglary (Pen. Code, § 459).[2] The jury found a person was present in the house at the time of the burglary. In a bifurcated proceeding, the trial court found Henderson had suffered one prior serious felony conviction for burglary, and Whitaker had suffered two prior serious felony convictions for burglary. (§§ 667, subds. (a)(1), (b) – (i); 1170.12, subds. (a) – (d).) Henderson's motion for a new trial, on the grounds of juror misconduct, was denied, as was his *Romero* motion.[3] Defendants' motion for access to juror identifying information was denied. The trial court sentenced Henderson to a term of 9 years in prison, and Whitaker to a term of 35 years to life in prison. It imposed restitution and suspended parole restitution fines on both defendants.

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[1] Only Henderson and Whitaker are parties to this appeal.

[2] All further undesignated statutory references are to the Penal Code.

[3] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

DISCUSSION

1. *The trial court did not abuse its discretion by denying appellants' Pitchess motion without conducting an in camera review of personnel records.*

a. *Additional facts.*

On October 5, 2006, all four defendants filed a joint motion for discovery of peace officer personnel records pursuant to *Pitchess v. Superior Court, supra*, 11 Cal.3d 531. The motion sought records pertaining to officers Alvarez, Evans, Chong, Acosta, Jackson, Parra, and Morales, concerning "evidence relating to accusations that any above named officer engaged in acts of excessive force, bias, dishonesty, coercive conduct or acts constituting a violation of the statutory or constitutional rights of others." The motion included a declaration executed by Henderson's counsel, discussed more fully *post.* On October 16, 2006, the motion was supplemented by a declaration from Whitaker's counsel. Attached to the motion were the police reports, property reports, and written probable cause determinations pertaining to each of the four defendants.

On November 14, 2006, Henderson's counsel filed a second, independent motion for *Pitchess* discovery. That motion sought, as to the same officers referenced above, "All complaints from any and all sources relating to acts of aggressive behavior, violence, excessive force, or attempted violence or excessive [force], racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, [or such reports made] to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude . . ." In support, Henderson's counsel filed a new, 11-page declaration which largely mirrored counsel's original declaration. Attached to the new motion were, inter

alia, police reports, written probable cause determinations, an investigatory follow-up report, and documents related to fingerprint evidence obtained from the Escalade.[4]

The motions were opposed by the L.A.P.D. After hearing argument from the parties, the trial court denied Henderson's, Whitaker's, and West's motions. In regard to Taylor's motion, the court found good cause for an in camera review of Officer Alvarez's personnel records for materials related to dishonesty. After conducting such a hearing, the trial court indicated there were no records to be disclosed.

b. *Discussion.*

Appellants contend the trial court erred by denying their *Pitchess* motions without conducting an in camera review of the requested police personnel records. We disagree.

(i) *Applicable legal principles*.

Evidence Code sections 1043 and 1045 establish a two-step procedure for a criminal defendant's *Pitchess* discovery of peace officer records. (*People v. Samuels* (2005) 36 Cal.4th 96, 109; *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1472-1473; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 9.) "To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) If a defendant shows good cause, the trial court examines the material sought in camera to determine whether disclosure should be made and discloses "only that information falling within the statutorily defined standards of relevance." (*Ibid.*) The statutory scheme balances the peace officer's claim to confidentiality and the

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[4] Because of the number and variety of assertions made in appellants' motions, we find it most expeditious to detail the relevant contents of the declarations *post*, during discussion of the merits of the motions.

defendant's compelling interest in all information pertinent to the defense. (*People v. Samuels, supra*, at p. 109.)

Warrick v. Superior Court, supra, 35 Cal.4th 1011, clarified the good cause standard. There is a " 'relatively low threshold' " for establishing the good cause necessary to compel in camera review by the court. (*Warrick, supra,* at p. 1019; *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316.) To establish good cause, "defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges" and articulate how the discovery sought might lead to relevant evidence. (*Warrick,* at p. 1024.) The defense must present "a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.* at p. 1025; *People v. Thompson, supra*, at p. 1316.) "A scenario sufficient to establish a plausible factual foundation 'is one that *might or could have occurred.* Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.' [Citation.]" (*People v. Thompson, supra*, at p. 1316.) Depending on the facts of the case, "the denial of facts described in the police report may establish a plausible factual foundation." (*Ibid.*; *Warrick,* at pp. 1024-1025.) A defendant need not establish that it is reasonably probable his version of events actually occurred, show that his story is persuasive or credible, or establish a motive for the alleged officer misconduct. (*Warrick,* at pp. 1025-1026.) Discovery is limited to instances of officer misconduct related to the misconduct asserted by the defendant. (*Warrick,* at p. 1021.)

Trial courts are vested with broad discretion when ruling on *Pitchess* motions (*People v. Memro* (1995) 11 Cal.4th 786, 832), and we review a trial court's ruling for abuse. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992; *People v. Mooc* (2001) 26 Cal.4th 1216, 1228; *People v. Hughes* (2002) 27 Cal.4th 287, 330.)[5]

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[5] Contrary to appellant Whitaker's argument, these authorities establish that the *Chapman* standard of review is inapplicable. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

(ii) *The trial court did not abuse its discretion by denying appellants' Pitchess motion.*

A. *Request for materials unrelated to allegations of misconduct.*

As an initial matter, we may quickly dispense with any contention that appellants' motions for in camera review should have been granted in their entirety. Appellants did not contend any officer used excessive force, engaged in coercive conduct, demonstrated sexual orientation or gender bias, planted evidence, made an illegal search or seizure, or – with the exception of the *Miranda* issue discussed *post* – violated appellants' constitutional rights. Records related to these categories of information were therefore irrelevant and not subject to in camera review. "A request for information that is irrelevant to the pending charges does not satisfy the specificity requirement." (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1096, fn. 7, overruled on other grounds in *People v. French* (2008) 43 Cal.4th 36, 48, fn. 5; *Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1021; *People v. Hustead* (1999) 74 Cal.App.4th 410, 416.) A "showing of good cause must be based on a discovery request which is tailored to the specific officer misconduct that is alleged." (*California Highway Patrol v. Superior Court, supra,* 84 Cal.App.4th at p. 1021 [when a defendant asserts his confession is coerced, a discovery request seeking all excessive force complaints is overly broad; only complaints by persons who alleged coercive techniques in questioning are relevant].)

B. *Purported racial bias.*

Likewise, Whitaker failed to establish records related to racial bias were relevant to any defense at trial. Whitaker's counsel's declaration averred that Whitaker believed he was arrested only because he was a Black man in a predominantly non-Black neighborhood. Whitaker averred that officers therefore "lied" to bolster the charges, including falsely accusing him of carjacking. Whitaker's conclusory and speculative allegations failed to establish a specific factual scenario of officer misconduct that was plausible when read in light of the pertinent documents, or that supported the defense to the proposed charges. Whitaker offered no facts showing he was innocent of the charges or suggesting the officers acted due to racial animus. Therefore, appellants failed to

establish good cause for in camera review of records related to racial or ethnic bias. As explained in *People v. Thompson, supra*, 141 Cal.App.4th at pages 1318-1319, "We are aware that [the defendant] need not present a factual scenario that is reasonably likely to have occurred or is persuasive or even credible. [Citation.] Further, we cannot conclude that [the defendant's] scenario is totally beyond the realm of possibility. [The defendant's] denials 'might or could have occurred' in the sense that virtually anything is possible. *Warrick* did not redefine the word 'plausible' as synonymous with 'possible,' and does not require an in camera review based on a showing that is merely imaginable or conceivable and, therefore, not patently impossible. *Warrick* permits courts to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations."

C. *Purported Miranda violations.*

Both appellants argued that violation of their or other defendants' *Miranda* rights[6] during interrogation demonstrated misconduct relevant to their trial defense. They averred that Officers Parra and Morales continued questioning even after the defendants invoked the right to remain silent. However, it was undisputed that none of the defendants had waived their *Miranda* rights, and none had made inculpatory statements that the People sought to use at trial. As the People did not seek to introduce any statements made by the defendants and there was no allegation of a waiver of rights, any purported *Miranda* violation could not have related to any possible defense to the charges. Appellants' assertions in regard to the interrogations therefore did not establish good cause for an in camera review of records.

D. *Allegations that did not demonstrate officer misconduct.*

Henderson's counsel's declaration averred that good cause existed for an in camera review, in that (1) *if* Officers Parra or Morales testified at trial that Henderson entered and exited Ngo's house in Rosemead, they would be lying; and (2) even if

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[6] *Miranda v. Arizona* (1966) 384 U.S. 436.

Henderson was the driver of the Escalade he was not guilty of burglary because he was unaware his passengers intended to commit burglary. Whitaker's counsel averred that (3) victim Ngo was unable to identify Whitaker as one of the burglars; and (4) officers "had no idea who, if anyone, entered the house" because they accused both defendants Henderson and Watson as "being the person who entered the house." None of these accusations establishes any misconduct by officers. It is axiomatic that the possibility that an officer might, in the future, testify to certain facts does not establish the officer has committed misconduct. The fact that a victim is unable to identify a perpetrator, like facts related to a defendant's knowledge of his associates' intentions, is unrelated to officer conduct. Finally, Watson was one of Henderson's aliases, so the police reports at issue contain no inconsistency regarding who entered Ngo's house.

E. *Miscellaneous allegations.*

Counsel's declarations in support of the motion further included a plethora of allegations of officer misconduct based on purported inconsistencies that, because of their immateriality or incompleteness, failed to establish good cause for in camera review. Appellants failed to present a specific factual scenario of officer misconduct that was plausible when read in light of the pertinent documents, and their allegations did not demonstrate any officer misconduct that supported a defense to the proposed charges. We discuss these averments seriatim.

First, Henderson's motion averred that the police report was fabricated because Detective Evans stated he saw the Escalade drive eastbound on 74th Street. According to Henderson, he "never drove an Escalade on January 31, 2006, on 74th" Street. However, no burglary was alleged to have been committed on 74th Street. Instead, the police report stated that the Escalade traveled on 74th Street before stopping at a tire store to have new wheel rims installed, well prior to the burglary. Notably, Henderson did not dispute that he was the driver of the Escalade later in the day.

In a similar vein, Henderson averred that the police report was fabricated to the extent it stated that he "made two U-turns after [Whitaker] and Taylor went into the house." Instead, Henderson argued, he "made a left turn and continued around the block,

until he returned from where he started." Whether Henderson made U-turns or continued around the block, he did not dispute the far more telling fact that he was the driver of the Escalade when the other men exited and approached the house.

Henderson further pointed out a discrepancy between the arrest report and a probable cause report. The arrest report stated Henderson was the driver of the Escalade and West was a passenger, whereas Officer Jackson's sworn probable cause report stated that West was the driver.[7] Again, while a discrepancy exists between the reports, it is largely immaterial. Henderson did not aver that he was not in the car, or uninvolved in the burglary. Thus, whether he or West was driving at any particular point in time was not a particularly significant fact for purposes of the *Pitchess* motion.

Henderson also challenged material in the police reports regarding events at the bowling alley. In particular, he averred that Officer Chong's account, that he had seen both Henderson and West enter the restroom, was untruthful. Henderson stated that he observed Chong enter the bowling alley, and Henderson did not visit the restroom after that point. However, as the trial court noted, Henderson did not dispute that he was at the bowling alley or that his clothing and the police scanner were found in the restroom. Thus, even if true, Henderson's assertion is largely immaterial. Further, the stated facts do not necessarily establish that the officer fabricated information; Chong could certainly have entered the bowling alley and observed Henderson without Henderson's knowledge, only to be observed by Henderson later.

Henderson contended that the police report contained fabricated information in regard to the request for a taxi. Henderson denied asking the bowling alley employee for a taxi, and therefore averred that the employee could not have told officers "that 'they' had requested a taxi cab." This scenario does not necessarily reflect an inconsistency, let alone officer fabrication. Counsel's declaration in support of the motion averred that "Henderson never asked the employee of the bowling alley for a taxi cab." It did *not* aver

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[7] At trial, Officer Jackson testified that he signed a probable cause declaration indicating West was the driver, but had been mistaken.

that Henderson never asked for the *telephone number* of a taxicab company. We observe that at trial, during cross-examination, Henderson's counsel elicited from the bowling alley employee that Henderson had asked for the *telephone number* of the cab, but did not ask the employee to *call for the taxi.* Thus, Henderson's counsel could have truthfully averred that Henderson had not "requested" a taxi, whereas the bowling alley employee – speaking as a layperson in less precise terms than those expected of an attorney crafting a legal declaration – used imprecise language to convey the same information, leading to the purported discrepancy. In any event, as the trial court found, the statement was credited to a third party and, even if incorrect, did not sufficiently demonstrate that the police officer lied.

Henderson also contends the police report falsely stated that, according to a bowling alley employee, both Henderson and West "had just arrived" at the bowling alley when Chong entered the scene. According to Henderson, 10 to 15 minutes had passed between his arrival and the officers' arrival; moreover, he and West did not arrive together. The foregoing does not establish a material discrepancy. It would be unsurprising for an employee to describe persons as having "just arrived" at the establishment if they had arrived within the prior 15 minutes, whether or not they came separately.

Henderson next averred that police could not have seen who was in the Escalade because the windows were tinted, and therefore officers must have fabricated the police reports. However, appellants nowhere aver that they and codefendants West and Taylor were *not* in the Escalade. It is not clear, on these facts, how the contention regarding window tinting establishes either officer misconduct or a plausible defense.

Finally, a police report prepared by Officer Alvarez stated that Whitaker exited the Escalade and went to the door of the house on Charlotte Street that bore the "for sale" sign. The report also averred that Whitaker entered Ngo's house. Whitaker's counsel's declaration averred that Whitaker had never approached any house in Rosemead with a "for sale" sign, or entered any house in Rosemead on the date of the burglary. Apart from the fact that the Charlotte Street house was in San Gabriel, not Rosemead,

Whitaker's account does not adequately establish a plausible factual scenario explaining Whitaker's own actions in a manner that supports his defense. Whitaker's declaration did not affirm or deny that he was in the Escalade or with the group that committed the burglary, nor did it offer any explanation for his actions that would provide a defense.

As is readily apparent, because none of the foregoing "discrepancies" related to material aspects of the crimes, or in some cases even established a genuine discrepancy, they did not establish officer misconduct within the meaning of *Pitchess.* An officer's misstatement about trivial aspects of the case would provide little or no meaningful defense to the charges at trial. Such a showing "is insufficient because it is not internally consistent or complete. We do not reject [the defendant's] explanation because it lacked credibility, but because it does not present a factual account of the scope of the alleged police misconduct, and does not explain [the defendant's] own actions in a manner that adequately supports his defense." (*People v. Thompson, supra,* 141 Cal.App.4th at p. 1317.)

(iii) *Brady disclosure.*

Henderson's second *Pitchess* motion contained a request for "[a]ny other material which is exculpatory or impeaching" within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83. Although the parties did not discuss *Brady* disclosure at the *Pitchess* hearing, Henderson now asserts that the trial court's denial of in camera review implicitly violated *Brady.* We have rejected a similar claim in *People v. Gutierrez, supra,* 112 Cal.App.4th 1463. Under *Brady,* a prosecutor must disclose material evidence that is favorable to the defendant. (*Id.* at p. 1471.) California's *Pitchess* discovery scheme "creates both a broader and lower threshold for disclosure than does the high court's decision in *Brady* . . . ." (*City of Los Angeles v. Superior Court, supra,* 29 Cal.4th at p. 14.) "[I]f a defendant cannot meet the less stringent *Pitchess* materiality standard, he or she cannot meet the more taxing *Brady* materiality requirement." (*People v. Gutierrez, supra,* at p. 1474; *People v. Thompson, supra,* 141 Cal.App.4th at p. 1319.) Therefore,

Brady is not violated by requiring disclosure only after an in camera review conditioned upon a showing of materiality. (*People v. Gutierrez, supra,* at p. 1476.)[8]

2. *The trial court did not err by denying appellants' motion for mistrial based on juror misconduct.*

a. *Additional facts.*

On April 19, 2007, the parties' arguments were concluded and the trial court instructed the jury. At 11:30 a.m., jury deliberations commenced. At noon, the jury recessed for lunch. Deliberations resumed again at 1:30 p.m.

After the lunch break, Henderson's counsel alerted the court that during the lunch hour, Henderson's uncle, Haziq Muhammad, was in the parking lot in his vehicle and saw Juror No. 10 and the alternate juror leave together in a gray BMW. Muhammad's vehicle was parked next to a pickup truck occupied by Juror No. 6. After lunch, Muhammad observed the alternate and Juror No. 10 approach Juror No. 6's truck. The alternate juror began speaking to Juror No. 6 loudly enough that Muhammad overheard. According to Muhammad, the alternate juror stated something like, " 'You know they're guilty. They go and knock and see if anyone is home and then the others go in.' " Juror No. 10 agreed with the alternate's statements. Juror No. 6 indicated the other two should stop discussing these matters outside the jury room. Nonetheless, according to Muhammad, Juror No. 6 commented that "there needs to be documentation," or words to that effect. The alternate replied, " 'No[,] there doesn't need to be any documentation. It's clear they're guilty.' " The alternate was the "instigator" of the discussion, but Juror No. 10 appeared to agree with his statements.

The trial court interviewed the jurors in question, beginning with the alternate. The alternate stated he and Juror No. 10 had gone to lunch together, and had parked next to Juror No. 6's truck after lunch. The men did not discuss the case at lunch. Instead they discussed other matters, including that the area in which Juror No. 10 lived was

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[8] Given our resolution of issues related to *Brady* and *Pitchess,* we need not reach the People's waiver contentions.

diverse and the residents got along well together. When asked whether any conversation transpired when he and Juror No. 10 returned from lunch and spoke with Juror No. 6, the alternate replied, "Well, some conversations did happen. I mean, not – I can't say it was directly to this case, but in scenarios where if I said something like 'if my car was in the parking lot, why would I want to take a cab?' " The other two men did not respond to the alternate's comment. When the court asked whether the alternate had been referencing the case, the alternate responded, "Not necessarily. You can look at it that way, but not necessarily." He explained, "it was just something I mentioned, but it didn't – it was just because we were standing there. And, you know, we were in the parking lot and that's why I mentioned it." The alternate also explained he and the others had discussed whether the jury might reach a verdict that day or the next. While the alternate's statements were somewhat jumbled, it appears he was concerned that, because he was not in the deliberation room, he might not be informed when the jury reached a verdict. The alternate denied that any of the three men opined the defendants were guilty. He stated: "The only thing I can remember [being discussed was] if the jurors might look like they can reach a decision today or tomorrow we'll sleep on it." He denied personally having reached an opinion on the defendants' guilt, explaining, "No, actually it's funny that you ask that because [with] me sitting upstairs, I haven't, you know. I think I realized yesterday that I wasn't going to have an opinion and I haven't reached one. And I haven't really thought about it at all." According to the alternate, none of the three jurors discussed needing documentation or knocking on doors.

Juror No. 10 stated he and the alternate did not discuss the case "at all" during lunch. He corroborated the alternate's account that they had discussed the Rosemead area, including the fact that the Hispanic and Asian populations interacted harmoniously. Juror No. 10 also corroborated that the alternate asked about scheduling, in particular whether he should " 'come back tomorrow to listen to the judge tell the final decision' " or whether the other jurors would let him know when a decision was reached, and whether it was likely he would have to return the following day. In the course of that discussion, Juror No. 6 stated: " 'I already have my decision.' " According to Juror

No. 10, no one expressed any opinion as to the defendants' guilt. Juror No. 10 did not recall anyone commenting about a taxi, knocking on doors, or needing documentation. Juror No. 10 confirmed that his mind was still open regarding the case, and he was ready to work with the other jurors during deliberations.

Juror No. 6 was interviewed last. When asked what he and the other two men had discussed at his truck during lunch, he responded, "We talking points about the case, but not really talking anything interesting." Later in the interview he clarified that he was referring to scheduling issues, in particular whether the jury would reach a verdict that day or the next. This was of special concern to Juror No. 6, in that he was not paid by his employer for his jury service and the trial had already lasted three weeks. In the context of this discussion, Juror No. 6 admitted stating that he "[had his] decision." He explained, "And then I asked them 'what do you think guys, is this going to be the last day for us or we're going to keep on this again?' Well, myself, "I have my decision already,' that's what I say." According to Juror No. 6, the others did not state that they had made up their minds about the case, did not opine that defendants were guilty, and did not discuss the need for documentation or the fact the defendants had knocked on doors. Juror No. 6 confirmed that he still had an open mind, would deliberate, and was listening and sharing his thoughts during deliberations.

The trial court denied defendants' motion for a mistrial on the ground of jury misconduct. It declined Henderson's counsel's suggestion that the court interview Henderson's uncle, Muhammad. The court reasoned that Muhammad's testimony would be superfluous in light of the fact the jurors and alternate had all denied stating an opinion about the defendants' guilt. The trial court rejected arguments that the jurors and alternate were not credible or straightforward, expressly refusing to adopt the notion that pauses in their answers indicated evasiveness or untruthfulness. Instead, the men's demeanor struck the court as an indication they were genuinely trying to recall the substance of their conversations. The court opined that the jurors doubtless thought, " 'My goodness, what in the world did I talk about' " that the trial court and all the attorneys " 'could be wanting to know?' " The court further observed that English

appeared to be a second language for both Juror Nos. 6 and 10, and "when you speak English as a second language you may understand a lot, but you're not going to be able to articulate it as quickly or as fluently as somebody [who is] a native speaker." The trial court expressed concern regarding the alternate's "taxi" comment, which referenced a fact presented at trial and reiterated during closing arguments. However, as the alternate was not a sitting juror, the trial court denied the mistrial motion. A verdict was reached the following day, April 20, 2007, at 10:50 a.m.

Prior to sentencing, Henderson moved for a new trial, based on essentially the same information provided by Muhammad. The new trial motion was denied. The parties do not appeal that ruling.

b. *Discussion.*

Appellants contend their mistrial motion should have been granted, and their convictions should be reversed, because Juror Nos. 10 and 6 discussed the matter outside the presence of the other 10 deliberating jurors and purportedly received information that was not part of the evidence presented at trial. We disagree.

(i) *Applicable legal principles.*

"An accused has a constitutional right to a trial by an impartial jury. [Citations.] An impartial jury is one in which no member has been improperly influenced [citations] and every member is ' "capable and willing to decide the case solely on the evidence before it" ' [citations]." (*In re Hamilton* (1999) 20 Cal.4th 273, 293-294.)

When determining whether prejudicial jury misconduct occurred, we accept the trial court's findings of historical fact and credibility determinations if supported by substantial evidence. Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. (*People v. Tafoya* (2007) 42 Cal.4th 147, 192; *People v. Danks* (2004) 32 Cal.4th 269, 303-304; *People v. Majors* (1998) 18 Cal.4th 385, 417.)

A sitting juror commits misconduct by failing to follow the instructions and admonitions given by the trial court. (*In re Hamilton, supra,* 20 Cal.4th at p. 305.) It is likewise misconduct for jurors to discuss any subject connected with the trial before all

the evidence has been presented, the trial court instructs the jury, and the jury retires to deliberate, or outside of deliberations. (§ 1122; *People v. Wilson* (2008) 44 Cal.4th 758, 838; *People v. Majors, supra,* 18 Cal.4th at pp. 422-423; *In re Hitchings* (1993) 6 Cal.4th 97, 118.) Likewise, it is misconduct for a juror to prejudge the case. (*People v. Merced* (2001) 94 Cal.App.4th 1024, 1031.) Here, jurors were advised they were not to discuss the case except in the jury room, with all 12 jurors present. The alternate was instructed not to have contact with the deliberating jurors. He was further instructed not to form or express an opinion about the issues in the case, or decide how he would vote if he was deliberating.

Misconduct by a juror raises a rebuttable presumption of prejudice. (*People v. Danks, supra,* 32 Cal.4th at p. 302; *In re Hamilton, supra,* 20 Cal.4th at p. 295.) Whether an individual verdict must be overturned for jury misconduct is resolved by reference to the substantial likelihood test, an objective standard. (*In re Hamilton, supra,* at p. 296.) The presumption of prejudice "can be rebutted by a showing no prejudice actually occurred or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party." (*People v. Loot* (1998) 63 Cal.App.4th 694, 697; *In re Hitchings, supra,* 6 Cal.4th at p. 119.) The verdict will not be disturbed if the entire record indicates "there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*In re Hamilton, supra,* at p. 296; *In re Carpenter* (1995) 9 Cal.4th 634, 653.) Among the factors to be considered are the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued. (*People v. Loot, supra,* at p. 698.)

"The standard is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts [citations]." (*In re Hamilton, supra,* 20 Cal.4th at p. 296.) "If the [criminal justice] system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.' [Citation.]" (*Ibid.*) Trivial violations that do not

prejudice the parties do not require removal of a sitting juror. (*People v. Wilson, supra,* 44 Cal.4th at p. 839.)

(ii) *Application here.*

The trial court credited the jurors' and alternate juror's accounts of what transpired. This finding was supported by substantial evidence. The men's accounts were consistent in many respects, including in regard to the key inquiry whether any of them opined that the defendants were guilty. The court expressly heard argument, and ruled on, their credibility. (*In re Carpenter, supra,* 9 Cal.4th at p. 646 ["The power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court, and its findings of fact, express or implied, must be upheld if supported by substantial evidence"]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 646; *People v. Majors, supra,* 18 Cal.4th at p. 424.) We decline appellants' suggestion that we should revisit the court's credibility determination and substitute appellants' trial counsels' views on credibility for the trial court's. It is axiomatic that defense counsels' role was not to act as unbiased, objective triers of fact, but instead to advocate for their clients. It would, therefore, be improper for this court to find defense counsel were in "a superior position to interpret the jurors' demeanors,"[9] as argued by appellants.

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[9] We likewise decline to adopt Henderson's suggestion that, because Mohammad was not examined by the trial court, Mohammad's subsequent declaration, filed in support of appellants' new trial motion, "should be treated both as credible and relevant to this court's determination." We discern no deficiency in the trial court's investigation into the matter. After hearing from the two sitting jurors and the alternate, the court expressly concluded hearing further from Mohammad was unnecessary, in that all three jurors had denied Mohammad's "main allegation" that the men had stated defendants were guilty. The specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion. (*People v. Seaton* (2001) 26 Cal.4th 598, 676 [trial court reasonably concluded that once it had found a juror had not intended to make an obscene gesture, there was no reason to question remaining jurors].) The court did not abuse its discretion here, and there is no basis to disregard its credibility findings.

There is no question the alternate juror committed misconduct by failing to follow the court's instructions not to have contact with deliberating jurors and not to discuss the case with anyone. However, the alternate was never seated as a juror, and therefore his misconduct cannot have justified a mistrial unless it somehow affected Juror Nos. 6 and 10.

Juror Nos. 6 and 10 technically committed misconduct by discussing the case outside deliberations, i.e., by speculating whether the jury would return a verdict that day or the next. Juror No. 6's comment that he already had reached his decision was likewise improper. Nevertheless, these actions do not demonstrate any reasonable probability of prejudice. Indeed, even accepting, for purposes of argument only, the allegations made by Muhammad, we conclude there was no substantial likelihood of bias or prejudice. At worst, Juror Nos. 6 and 10 heard the alternate's opinion that the defendants were guilty, based on his reference to evidence presented at trial, i.e., the "taxi" and "knocking on doors" comments. Contrary to appellants' argument, there is no indication the sitting jurors considered or became aware of any material that was not part of the trial record. The alleged misconduct did not involve outside influences that might have impacted the jury's deliberations. The evidence purportedly referenced by the alternate was presented at trial and its inculpatory nature would have been patently obvious to all jurors, even absent the alternate's comments. The alleged comments were made in a brief exchange; there was no allegation the jurors engaged in a lengthy deliberation outside the jury room. The conversation transpired between jurors and an alternate, not between jurors and a witness or other outsiders. Moreover, there was nothing particularly compelling about the alternate's alleged opinion that the defendants were guilty, and nothing suggests the sitting jurors would have given particular credence to his views. Other jurors, during deliberations, must have expressed the same viewpoint. Nothing suggests the alternate's statements were likely to, or did, cause either sitting juror to become biased against the defendants or cast a guilty vote. Notably, no juror was alleged to have made any statement indicating pressure to reach a quick verdict.

Appellants' contention that Juror Nos. 6 and 10 prejudged the case is equally unpersuasive. Juror No. 6's comment that he "had his decision," and Juror No. 10's alleged comment that the defendants were guilty, were made after all evidence had been presented, after the parties argued, after the jury was instructed, and after deliberations commenced. The same opinions, had they been made in the jury room, would not have been misconduct at all; no improper information was discussed. It is hardly surprising that jurors, at that point in the proceedings, might have reached a preliminary opinion about the defendants' guilt. While jurors are "told not to discuss the case until all the evidence has been presented and instructions given, they are not precluded from thinking about the case, nor would that be humanly possible." (*People v. Wilson*, *supra*, 44 Cal.4th at p. 840.) Nothing suggested Juror Nos. 6 and 10 were unwilling to engage in the deliberative process, or that their views were fixed conclusions. Both jurors informed the court they would still deliberate and still had open minds.

Indeed, it has been held that conduct demonstrating far less willingness to deliberate is not prejudicial. In *People v. Leonard* (2007) 40 Cal.4th 1370, for example, a juror announced, at the beginning of deliberations, his view that the defendant was guilty. He then retired to a corner to read a book. Attempts by other jurors to involve the juror in deliberations were unsuccessful. (*Id.* at p. 1410.) *Leonard* concluded that while the juror's behavior constituted misconduct, it did not prejudice the defendant and did not demonstrate the juror had prejudged the case. (*Id.* at pp. 1410-1412.) Instead, the juror "apparently concluded, based on the evidence presented at trial, that the evidence of defendant's guilt was so overwhelming that there was nothing left to discuss." (*Id.* at p. 1412.) The allegations here are far less compelling than in *Leonard*. There was no basis in the instant matter from which the trial court could have found the jurors prejudged the case.

In sum, while misconduct occurred, the presumption of prejudice has been amply rebutted. The alleged misconduct was far less serious than when jurors obtain extrinsic information about the case (*People v. Wilson, supra,* 44 Cal.4th at p. 839) or seek guidance about the case from outside parties. (See, e.g., *People v. Danks, supra,* 32 Cal.4th at pp. 307, 309 [no prejudice found despite two jurors' discussions about the case with their pastors].) The trial court did not err by denying the mistrial motion.

3. *The trial court did not commit instructional error.*

Without objection, the trial court instructed with CALCRIM Nos. 223[10] (direct

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[10] CALCRIM No. 223 provided: "Facts may be proved by direct or circumstantial evidence or by a combination of both. Direct evidence can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. Circumstantial evidence also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside. [¶] Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence."

and circumstantial evidence), 226[11] (witness credibility) and 302[12] (evaluating conflicting proof). Appellants contend these instructions impermissibly lessened the prosecution's burden of proof and were "clearly erroneous," or at least ambiguous.

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[11] CALCRIM No. 226 provided: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's gender, race, religion, or national origin. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

[12] CALCRIM No. 302, as provided to the jury, stated: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of the greater number of witnesses, or any witness, without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

We disagree. The challenged instructions do not expressly state the propositions that appellants find objectionable, discussed *post.* The instructions are therefore not clearly erroneous. Instead, appellants' argument is that jurors would draw improper inferences from certain portions of the instructions. When reviewing a purportedly ambiguous jury instruction, we ask whether there is a reasonable likelihood the jury has applied the challenged instruction in a way that violates the Constitution. (*People v. Richardson* (2008) 43 Cal.4th 959, 1028; *People v. Crew* (2003) 31 Cal.4th 822, 848; *People v. Smithey* (1999) 20 Cal.4th 936, 963.) " 'In conducting this inquiry, we are mindful that " 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " [Citations.]' [Citation.]" (*People v. Richardson, supra,* at p. 1028; *People v. Harrison* (2005) 35 Cal.4th 208, 252; *People v. Holt* (1997) 15 Cal.4th 619, 677; *Middleton v. McNeil* (2004) 541 U.S. 433, 437.) " 'Additionally, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" (*People v. Richardson, supra*, at p. 1028.) "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is ' "whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process." ' " (*Middleton v. McNeil, supra,* at p. 437.) Applying these principles here, it is clear the challenged instructions are not objectionable.

a. *CALCRIM No. 302.*

Appellants raise a variety of complaints about CALCRIM No. 302, none persuasive. First, they point to CALCRIM No. 302's statement that, "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe." Appellants contend this portion of the instruction incorrectly tells jurors they must "believe" evidence presented by the defense in order to acquit, whereas in fact only the People have any burden of proof. CALCRIM No. 302, however, does not suggest, explicitly or implicitly, that the defendant has the burden of proof to show his innocence or disprove the People's evidence. CALCRIM No. 302 simply states the accurate and unobjectionable proposition that jurors must decide what evidence, " 'if any,' " to

believe. CALCRIM No. 220, not CALCRIM No. 302, sets forth the People's burden of proof. CALCRIM No. 220 clearly informed the jury that "[a] defendant in a criminal case is presumed to be innocent" and the People must "prove a defendant guilty beyond a reasonable doubt." Reading the instructions as a whole, no reasonable juror would have deduced, from the aforementioned portion of CALCRIM No. 302, that the defendants had any burden of proof.

Second, appellants urge that CALCRIM No. 302's statement that jurors should not disregard testimony "without a reason" incorrectly creates a presumption that all witnesses are deemed truthful, requiring jurors to credit the People's witnesses. *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1190, and *People v. Anderson* (2007) 152 Cal.App.4th 919, 939, have rejected this contention. "CALCRIM No. 302 does not create a presumption of credibility. It merely cautions the jurors not to disregard testimony on a whim. In this regard, CALCRIM No. 302 is no different from CALJIC No. 2.22, which cautions jurors not to disregard the testimony of the greater number of witnesses 'merely from caprice, whim or prejudice.' " (*People v. Anderson, supra,* at p. 939.) CALJIC No. 2.22 has been approved by our Supreme Court. (*Ibid.; People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885; *People v. Ibarra, supra,* at p. 1190*;* see also *People v. Felix* (2008) 160 Cal.App.4th 849, 858.) Further, appellants' argument disregards the fact that CALCRIM No. 226 instructed jurors they alone must determine the credibility or believability of the witnesses, and set forth a variety of factors they might consider when making this determination. (*People v. Anderson, supra,* at p. 939.)

Third, appellants posit that the instruction's advice not to "favor one side over the other" was incorrect, because the presumption of innocence requires that jurors "favor" the defense unless the prosecution proves otherwise. Appellants further argue that by focusing on the evidence, the instruction "improperly frames the issues in terms of which side presented the more compelling evidence." We disagree. "Quite to the contrary, the instruction is impartial. The instruction mandates that the jury 'not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other' but does not tell the jury to favor one side or the other. [Citation.] The

instruction mandates that the jury 'decide what evidence, if any, to believe,' regardless of which side introduces the evidence, but does not tell the jury to disregard the prosecution's burden of proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by the prosecution than by the defense." (*People v. Ibarra, supra,* 156 Cal.App.4th at p. 1191, italics omitted; *People v. Anderson, supra,* 152 Cal.App.4th at p. 939; *People v. Felix, supra,* 160 Cal.App.4th at p. 858.)

Fourth, appellants argue the instruction improperly "directs the jury to choose between the government's witnesses and the defense witnesses," whereas in fact, a jury is not required to choose between the two sides but instead may conclude neither side is entirely correct. In a related contention, appellants complain the instruction improperly suggests that the number of witnesses is a factor the jury may consider when deciding which of two conflicting versions of the evidence is correct. Appellants "misread[] the instruction, which cautions the jury, 'What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.' [Citation.] 'The instruction says nothing about choosing between prosecution and defense witnesses. It merely states the common sense notion that the number of witnesses who have given testimony on a particular point is not the test for the truth of that point. It does no more. The jury remains free to choose the witness or witnesses it believes and what part of a witness's testimony it finds believable.' " (*People v. Ibarra, supra,* 156 Cal.App.4th at p. 1191, italics omitted; *People v. Anderson, supra,* 152 Cal.App.4th at p. 940; *People v. Felix, supra,* 160 Cal.App.4th at p. 858.)

b. *CALCRIM Nos. 223 and 226.*

Appellants similarly assert that both CALCRIM Nos. 226 and 223 are defective because both suggest the defense has a duty to present evidence or disprove the charge. In this regard, they find objectionable CALCRIM No. 223's statement that both direct and circumstantial evidence are acceptable to "prove or disprove the elements of a charge," and CALCRIM No. 226's statement that, when evaluating witness credibility,

jurors might consider whether "other evidence prove[d] or disprove[d] any fact about which the witness testified[.]"

Neither instruction suggests a defendant bears any burden of proof at trial. CALCRIM No. 223 accurately states that either direct or circumstantial evidence may disprove the elements of a charge. This statement does not implicitly or explicitly suggest the defendant has any burden of proof, especially when read in conjunction with the reasonable doubt instruction, CALCRIM No. 220. The same is true in regard to CALCRIM No. 226. The sole basis for appellants' challenge appears to be the instructions' use of the word "disprove." However, it is accurate that evidence – either presented by the People or by the defendant – can establish that an element of the charged crimes has not been met. Reasonable jurors would not make the mammoth logical leap from mere use of the word "disprove" to a conclusion that the defendant bears a burden of proof.

In sum, there was no instructional error.

4. *Custody credit.*

Appellant Whitaker asserts he is entitled to two additional days of presentence custody credit. However, we take judicial notice of the trial court's minute order of April 17, 2008, in which the court corrected Whitaker's custody credits as requested. (Evid. Code, § 452.) Whitaker's contention is therefore moot.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.